A FALSE START IN THE RACE AGAINST DOPING IN SPORT: CONCERNS WITH CYCLING’S BIOLOGICAL PASSPORT

NICHOLAS HAILEY†

The biological passport is . . . . like a custom-built Ferrari: but maybe it’s been put on the road too soon to act as an anti-doping control.
– Dr. Roberto Corsetti

ABSTRACT

Professional cycling has suffered from a number of doping scandals. The sport’s governing bodies have responded by implementing an aggressive new antidoping program known as the biological passport. Cycling’s biological passport marks a departure from traditional antidoping efforts, which have focused on directly detecting prohibited substances in a cyclist’s system. Instead, the biological passport tracks biological variables in a cyclist’s blood and urine over time, monitoring for fluctuations that are thought to indirectly reveal the effects of doping. Although this method of indirect detection is promising, it also raises serious legal and scientific concerns. Since its introduction, the cycling community has debated the reliability of indirect biological-passport evidence and the clarity, consistency, and transparency of its use in proving doping violations. Such uncertainty undermines the legitimacy of finding

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† Duke University School of Law, J.D. expected 2012; Vanderbilt University, B.A. 2006.
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cyclists guilty of doping based on this indirect evidence alone. Antidoping authorities should address these important concerns before continuing to pursue doping sanctions against cyclists solely on the basis of their biological passports.

INTRODUCTION

Doping\(^2\) is as old as the sport of cycling itself.\(^3\) As early as the nineteenth century, cyclists competing in the grueling “six-day” races concocted cocktails of caffeine, strychnine, and cocaine to improve their performance.\(^4\) In the years since, long-distance cycling has become known as “the most consistently drug-soaked sport of the twentieth century.”\(^5\)

In October 2007, the International Cycling Union (UCI)\(^6\) and World Anti-Doping Agency (WADA)\(^7\) agreed to implement a radical

\(^2\) For the purposes of this Note, the term “doping” will be used to refer generally to the use of any prohibited substance or method to improve athletic performance. Similarly, the World Anti-Doping Code (Code) defines doping broadly as “the occurrence of one or more of the anti-doping rule violations” described in the Code. WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE 18 (2009), available at http://www.wada-ama.org/rtecontent/document/code_v2009_EN.pdf. These doping violations include having of a prohibited substance in an athlete’s blood or urine, using or attempting to use a prohibited substance or method, refusing to submit to or missing doping tests, tampering with doping-test samples, possessing or trafficking in a prohibited substance or method, or administering a prohibited substance or method to another athlete. Id. at 19–25. The Prohibited List details the various prohibited substances and methods defined as doping under the Code. Id. at 29.

\(^3\) In fact, the history of doping in sport dates back thousands of years. The ancient Greeks experimented with the performance-enhancing effects of dried figs as early as the Olympic Games of 668 B.C. They also experimented with the stimulant effects of brandy and wine and even reportedly ate animal and human testes to boost their testosterone levels. Richard I.G. Holt, Ioulietta Erotokritou-Mulligan & Peter H. Sönksen, The History of Doping and Growth Hormone Abuse in Sport, 19 GROWTH HORMONE & IGF RES. 320, 320 (2009); see also A Brief History of Anti-Doping, WORLD ANTI-DOPING AGENCY, http://www.wada-ama.org/en/About-WADA/History/A-Brief-History-of-Anti-Doping (last updated June 2010) (providing a historical account of doping practices).

\(^4\) Holt et al., supra note 3, at 321.


\(^7\) WADA is the international organization that governs antidoping efforts across all Olympic sports, including professional cycling. About WADA, WORLD ANTI-DOPING AGENCY, http://www.wada-ama.org/en/About-WADA (last updated June 2011).
new antidoping program known as the biological passport. This decision came in the wake of an extraordinary succession of doping scandals surrounding the 2007 Tour de France—a “doping crisis” that rocked professional cycling and threatened the sport’s credibility.

Cycling’s biological passport represents an aggressive new approach to antidoping efforts in sport. The biological passport is an individual, electronic profile that collates various biological parameters in a cyclist’s blood and urine. Whereas antidoping efforts have traditionally focused on the direct detection of prohibited substances in a cyclist’s blood or urine, the biological passport...
instead tracks fluctuations in otherwise-normal biological variables that are thought to indirectly reveal the effects of doping.\textsuperscript{15}

In other words, cycling’s biological passport does not require a cyclist to actually test positive for a prohibited substance or method—a result known as an \textit{analytical positive} finding—before being found guilty of doping.\textsuperscript{16} Instead, cyclists can be prosecuted, found guilty, and sanctioned for doping based solely on inferences drawn from biological fluctuations.

Although the Court of Arbitration for Sport (CAS) has upheld the initial doping sanctions that have arisen under cycling’s biological passport, this Note argues that serious concerns remain regarding the reliability of inferences drawn from biological-passport data and regarding the fairness of sanctioning cyclists for doping solely on the basis of this indirect evidence. As a result, the program’s approach fails to strike the proper balance between effectively policing the sport for doping and safeguarding cyclists’ individual rights.\textsuperscript{17} Accordingly, until the science underlying cycling’s biological passport has been further refined, cyclists should not be found guilty of doping violations unless additional corroborating evidence of doping exists.

Part I of this Note provides an overview of the antidoping framework in international sport, describing the numerous international and national organizations that manage and administer antidoping policy. Part II describes the shifting focus of antidoping efforts, from traditional approaches premised on direct detection of doping to more recent efforts that rely increasingly on indirect detection. Part III discusses the introduction of cycling’s biological passport and the first antidoping cases pursued under the program.

\textsuperscript{15} See \textit{Athlete Biological Passport}, WORLD ANTI-DOPING AGENCY, http://www.wada-ama.org/en/Science-Medicine/Athlete-Biological-Passport (last updated Dec. 2009) (“The fundamental principle of the [biological passport] is based on the monitoring of an athlete’s biological variables over time to facilitate indirect detection of doping on a longitudinal basis, rather than on the traditional direct detection of doping.”); \textit{Biological Passport—Questions/Answers, supra} note 13 (“The approach relies on the concept of ‘indirect’ detection. Scientific experts will not actually ‘see’ a banned substance in a sample. Instead, they will compare the parameters of the new sample to parameters measured in previous samples. In this way, fluctuations in the riders’ levels which may indicate manipulation can be identified.”).

\textsuperscript{16} McLaren, \textit{ supra} note 14, at 9.

\textsuperscript{17} See Ryan Connolly, \textit{Note, Balancing the Justices in Anti-Doping Law: The Need To Ensure Fair Athletic Competition Through Effective Anti-Doping Programs Vs. the Protection of Rights of Accused Athletes}, 5 VA. SPORTS & ENT. L.J. 161, 174 (2006) (“The complex nature of anti-doping efforts requires a carefully crafted legal system to accomplish the dual goals of ensuring fair sport through effective anti-doping measures and assuring equity to individual athletes.”).
Part IV evaluates the unique concerns raised by the biological passport, specifically the reliability of indirect biological-passport evidence and the fairness of finding cyclists guilty of doping based on this evidence alone. Part V provides recommendations that would allow antidoping authorities to address these concerns while continuing to utilize the biological passport as an antidoping control.

I. THE ANTIDOPING MOVEMENT IN INTERNATIONAL SPORT

International antidoping efforts are governed by private contracts and administered by a network of international and national organizations. Antidoping regulation in international sport is essentially “the enforcement of these private agreements.” Numerous antidoping authorities enforce these regulations, including the International Olympic Committee (IOC), WADA, international federations (IFs), national governing bodies (NGBs), and the CAS. To enter into international competition, athletes must agree to be bound by the antidoping rules that govern their respective sports. For instance, professional cyclists agree to submit to in- and out-of-competition doping tests and to abide by sanctions if they are found guilty of doping violations.

A. The IOC

Antidoping efforts in international sport have traditionally been focused on the Olympic Movement. The IOC is the “supreme authority of the Olympic Movement” and has ultimate control over

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19. Connolly, supra note 17, at 163.
20. Id. at 175.
21. UNION CYCLISTE INTERNATIONALE, UCI CYCLING REGULATIONS: PART 14: ANTI-DOPING (2011), available at http://www.uci.ch/Modules/BUILTIN/getObject.asp?MenuId=&ObjTypeCode=FILE&type=FILE&id=NDc3MDk (“Riders and other Persons accept these rules as a condition of participation and shall be bound by them.”); WORLD ANTI-DOPING AGENCY, supra note 2, at 17 (“Athletes or other Persons accept these rules as a condition of participation and shall be bound by these rules.”) (emphasis omitted).
22. See, e.g., UNION CYCLISTE INTERNATIONALE, supra note 21, at 1–3 (outlining the parameters of these tests).
23. See, e.g., id. at 51–62 (describing the sanctions and consequences for doping violations).
24. Connolly, supra note 17, at 163.
antidoping regulation in all Olympic sports. To be eligible for the Olympic Games, all IFs, national Olympic committees (NOCs), and NGBs must adhere to the IOC’s rules. The IOC created WADA and the CAS and designated them as the independent bodies responsible for administering antidoping efforts.

B. WADA and the World Anti-Doping Code

WADA is the international organization that governs antidoping efforts across all Olympic sports, including professional cycling. WADA was born in the aftermath of the Festina affair, a major scandal at the 1998 Tour de France that revealed a widespread network of systematic doping in professional cycling. The Festina affair underscored the need for an independent body to govern antidoping efforts in international sport. As a result, the IOC founded WADA the following year.

WADA “promote[s], coordinate[s], and monitor[s] the fight against doping in sport in all its forms.” WADA serves a twofold purpose: (1) to protect the fundamental rights of athletes to participate in sport free of doping and “thus promote health, fairness and equality” for athletes worldwide, and (2) to “ensure harmonized, coordinated and effective antidoping programs at the international and national level with regard to detection, deterrence and prevention of doping.” To meet these goals, WADA administers the World Anti-Doping Program, which comprises the World Anti-


27. About WADA, supra note 7.


29. A Brief History of Anti-Doping, supra note 3.

30. Id.


32. WORLD ANTI-DOPING AGENCY, supra note 2, at 11.

Doping Code (Code), International Standards, and Model Rules and Guidelines. The Code is the uniform set of antidoping rules that governs all Olympic sports, including professional cycling. The Code formally defines doping and describes the burden of proof, standard of proof, evidentiary standards, and right to a fair hearing applicable to all disciplinary proceedings for doping violations. The Olympic Charter requires that all organizations within the Olympic Movement adopt and implement the Code.
C. IFs

IFs govern particular sports at the international level and administer international antidoping programs. In this capacity, IFs initiate disciplinary proceedings for alleged doping violations and act as the prosecuting authority in these cases. The UCI is the IF that governs the sport of cycling and the body that directly administers cycling’s biological passport. The UCI has incorporated the Code into its own antidoping rules, formally placing antidoping efforts in professional cycling under WADA’s ultimate authority.

D. NGBs

NGBs manage their respective sports at the national level. Each NGB is a member of its sport’s IF and must adhere to the IF’s antidoping rules and to the Code. NGBs in professional cycling include the Italian Cycling Federation (FCI) and the Royal Spanish Cycling Federation (RFEC). These bodies adjudicate disciplinary proceedings in which the UCI accuses cyclists of doping violations. These proceedings are governed by the UCI’s antidoping rules and by the Code.

E. The CAS

The CAS is international sport’s highest court and the “exclusive arbitral tribunal for the binding adjudication of disputes” involving

42. Connolly, supra note 17, at 163.
44. Id. at 30.
45. Mission Statement, supra note 6.
47. See UNION CYCLISTE INTERNATIONALE, supra note 21 (“[T]he UCI Management Committee decided to accept the World Anti-Doping Code and to incorporate the Code in UCI’s Regulations . . . .”).
49. Connolly, supra note 17, at 163.
50. Id.
51. See UNION CYCLISTE INTERNATIONALE, supra note 21, at 46 (delineating the right to a fair hearing). NGBs may also choose to refer antidoping cases to an external hearing panel, such as an NOC tribunal. Id. at 47.
52. Id.
Olympic sports, including professional cycling. The CAS’s “most visible role” in the 1990s and 2000s has been arbitrating antidoping disputes. WADA, IFs, and athletes may appeal antidoping decisions by NGBs to the CAS, which then acts as the final arbiter with respect to doping violations.

II. THE EVOLUTION OF ANTIDOPING EFFORTS IN SPORT

Antidoping efforts have traditionally been premised on the direct detection of a prohibited substance in an athlete’s blood or urine, typically through a positive doping test. Increasingly, however, antidoping authorities have explored new approaches to pursuing doping violations in the absence of positive doping tests.

A. Traditional Antidoping Controls: Direct Detection Through Analytical Positive Findings

Traditional antidoping efforts have been aimed at directly detecting prohibited substances. WADA maintains a list of such banned substances, including both exogenous and endogenous substances. WADA maintains a list of such banned substances, including both exogenous and endogenous substances.

54. Connolly, supra note 17, at 164.
55. See UNION CYCLISTE INTERNATIONALE, supra note 21, at 63–66 (outlining the procedure for appealing to the CAS). The CAS reviews the facts and law in such cases de novo. Weston, supra note 43, at 22.
56. Connolly, supra note 17, at 165; see also Types of Disputes Submitted to the CAS, COURT OF ARBITRATION FOR SPORT, http://www.tas-cas.org/en/infogenerales.asp/4-3-239-1011-4-1-1/5-1-1/5-0-1011-3-0-0 (last visited Oct. 7, 2011) (“[Antidoping] disciplinary cases are generally dealt with in the first instance by the competent sports authorities, and subsequently become the subject of an appeal to the CAS, which then acts as a court of last instance.”).
57. See UNION CYCLISTE INTERNATIONALE, supra note 12, at 16 (“Before the introduction of the biological passport, the anti-doping fight used only direct methods of detection. A blood or urine sample was taken from a rider, then analysed to detect prohibited substances or highlight whether a doping method had been used (such as a blood transfusion). If the threshold of a prohibited substance was exceeded, or any illegal manipulations detected, sanctions were imposed.”); WORLD ANTI-DOPING AGENCY, ATHLETE BIOLOGICAL PASSPORT OPERATING GUIDELINES AND COMPILATION OF REQUIRED ELEMENTS 3 (2010), available at http://www.wada-ama.org/Documents/Resources/Guidelines/WADA_ABP_OperatingGuidelines_EN_2.1.pdf (“The typical Doping Control approach [is] based on the detection of Markers of a substance or its Metabolites . . . .” (emphasis omitted)).
58. WORLD ANTI-DOPING AGENCY, THE 2011 PROHIBITED LIST, supra note 35.
59. An exogenous substance is “not ordinarily capable of being produced by the body naturally,” and an analytical positive finding of an exogenous substance at any level may signal a doping violation. Id. at 1.
60. An endogenous substance “is capable of being produced by the body naturally.” Id. A finding that an endogenous substance exceeds a predetermined ratio may signal a doping
substances. Article 2.1 of the Code provides that the “Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete’s Sample” constitutes a doping violation. Under Article 2.1, an athlete must test positive for a prohibited substance—a result known as an analytical positive finding—before being found guilty of committing a doping violation.62

In the event of an analytical positive finding, the Code guarantees an athlete’s right to a fair hearing. Specifically, the Code provides as follows:

The [antidoping] hearing process shall respect the following principles:

• a timely hearing;
• a fair and impartial hearing panel;
• the right to be represented by counsel at the Person’s own expense; the right to be informed in a fair and timely manner of the asserted anti-doping rule violation;
• the right to respond to the asserted anti-doping rule violation and resulting Consequences;
• the right of each party to present evidence, including the right to call and question witnesses (subject to the hearing panel’s discretion to accept testimony by telephone or written submission);
• the Person’s right to an interpreter at the hearing, with the hearing panel to determine the identity, and responsibility for the cost, of the interpreter; and
• a timely, written, reasoned decision, specifically including an explanation of the reason(s) for any period of Ineligibility.63

violation because it indicates that “the concentration of the substance in the specimen so deviates from the range of values normally found in humans that it is unlikely to be consistent with normal endogenous production.” Jessica K. Foschi, A Constant Battle: The Evolving Challenges in the International Fight Against Doping in Sport, 16 DUKE J. COMP. & INT’L L. 457, 471–72 (2006). Doping violations based on endogenous-substance ratios are a “hotly contested issue,” id. at 472, and raise a number of the same concerns as cycling’s biological passport.

61. WORLD ANTI-DOPING AGENCY, supra note 2, at 19 (emphasis added) (emphasis omitted). This is the first doping violation enumerated in the Code. Id.

62. Id.

63. Id. at 48–49. Although these basic principles ensure athletes’ rights to a fair hearing, athletes are not afforded the same due process protections as are embodied in the Fourteenth Amendment. Meredith Lambert, The Competing Justices of Clean Sport: Strengthening the Integrity of International Athletics While Affording a Fair Process for the Individual Athlete Under the World Anti-Doping Program, 23 TEMP. INT’L & COMP. L.J. 409, 418–19 (2009).
In an analytical positive case, the antidoping authority has the burden of proving that the athlete has committed a doping violation. The standard of proof in such a case is “whether the Anti-Doping Organization has established a doping violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made.” According to the Code, this comfortable-satisfaction standard is “greater than a mere balance of probability but less than proof beyond a reasonable doubt.” In other words, the “rigor [of this standard] lies somewhere between what is normally applied in private law and what is applied under public (penal or criminal) law.”

Analytical positive cases present relatively straightforward evidentiary issues because the Code provides for strict liability in such cases. Under the Code, each athlete has a “personal duty to ensure that no Prohibited Substance enters his or her body.” A doping violation thus occurs “whenever a Prohibited Substance is found in an Athlete’s Sample,” regardless of whether the athlete “intentionally or unintentionally Used a Prohibited Substance or was negligent or otherwise at fault.” Therefore, a positive doping test alone will typically suffice to prove an athlete guilty of doping.

65. Id. (emphasis added).
66. Id.
69. WADA relied on the CAS’s reasoning in a previous antidoping arbitration to justify the use of the strict-liability standard in the Code. See USA Shooting & Q. v. Union Internationale de Tir, No. CAS 94/129, at 6 (Cl. of Arb. for Sport 1995), http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/129.pdf (“It is true that a strict liability test is likely in some sense to be unfair in an individual case, such as that of Q., where the athlete may have taken medication as the result of mislabelling or faulty advice for which he or she is not responsible . . . . But it is also in some sense ‘unfair’ for an athlete to get food poisoning on the eve of an important competition. Yet in neither case will the rules of the competition be altered to undo the unfairness. Just as the competition will not be postponed to await the athlete’s recovery, so the prohibition of banned substances will not be lifted in recognition of its accidental absorption. The vicissitudes of competition, like those of life generally, may create many types of unfairness, whether by accident or the negligence of unaccountable persons, which the law cannot repair.”).
70. World Anti-Doping Agency, supra note 2, at 19 (emphasis omitted).
71. Id.
72. A doping violation in an analytical positive case is proven by “direct evidence, where a positive drug test will directly show that an athlete had a prohibited substance in [his] body.”
Although this strict-liability standard may appear harsh, analytical positive cases also provide certain safeguards for accused athletes. For instance, an analytical positive finding generally requires that both an “A” and “B” sample of the athlete’s blood or urine show the presence of a prohibited substance. This requirement protects against false positives and provides greater certainty that a doping violation has occurred. Moreover, athletes have the opportunity to present affirmative evidence showing that the analytical positive finding resulted from procedural laboratory error rather than doping. The Code, however, presumes the validity of tests conducted in WADA-accredited laboratories, and it is extremely difficult for athletes to rebut this mandatory presumption.

The direct-detection approach has certain limitations. For example, some prohibited substances—like synthetic erythropoietin (EPO), a hormone that enhances endurance by increasing oxygen in the blood, a process otherwise known as “blood doping”—can be


73. In fact, one commentator argues that strict liability places an “insurmountable burden on the athlete.” Foschi, supra note 60, at 479.

74. WORLD ANTI-DOPING AGENCY, supra note 2, at 20.


76. See WORLD ANTI-DOPING AGENCY, supra note 2, at 27 (“The Athlete or other Person may . . . establish[] that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding.” (emphasis omitted)).

77. See id. (“WADA-accredited laboratories are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories.” (emphasis omitted)).

78. Schmalzer, supra note 75, at 684.

79. See UNION CYCLISTE INTERNATIONALE, supra note 12, at 16 (“Indirect detection is a lot more efficient than direct detection because the effects of using banned substances are retained for a lot longer than the period during which it is possible to discover traces of the substances in the body.”); WORLD ANTI-DOPING AGENCY, supra note 57, at 3 (“[Traditional antidoping tests have] limitations when an Athlete may be using substances on an intermittent and low-dose basis which may therefore go undetected under even the most robust Out-of-Competition Doping Control program.” (emphasis omitted)); Wozny, supra note 13, at 79 (describing the limitations of traditional doping tests).
directly detected in the body only for a few days. Other prohibited substances may be impossible to detect using available doping tests. Recognizing these limitations, antidoping authorities have begun to pursue alternatives to direct detection.

B. New Antidoping Approaches: Nonanalytical Positive Cases

Antidoping authorities have increasingly explored newer approaches to proving doping violations even in the absence of positive doping tests. These efforts are known broadly as nonanalytical positive cases. The right to a fair hearing, the burden of proof, and the standard of proof are the same in nonanalytical positive cases as in analytical positive cases. Because nonanalytical positive cases do not involve a positive doping test, however, the strict-liability standard does not apply. The relevant antidoping authority has the burden of proving that a doping violation has occurred through circumstantial—indirect—evidence or through direct evidence other than an analytical positive finding. These cases present challenges relating to the sufficiency of such evidence and the fairness of finding an athlete guilty of doping in the absence of a positive doping test.

The Code specifically provides that an athlete may be found guilty of doping “where there is evidence that a doping violation occurred but where there is no positive doping control test.”

81. Id.
83. See *supra* notes 63–67 and accompanying text.
85. McLaren, *supra* note 84, at 194. A nonanalytical positive case may involve “anything other than a positive laboratory test.” Foschi, *supra* note 60, at 481.
86. *World Anti-Doping Code*, *supra* note 37. The potential scope of nonanalytical positive cases is “really quite broad.” Cameron A. Myler, *Resolution of Doping Disputes in Olympic Sport: Challenges Presented by “Non-Analytical” Cases*, 40 NEW ENG. L. REV. 747, 749 (2006) (noting that nonanalytical positive cases could include “refusing to submit to drug testing, admitting to the use of a substance, tampering with any part of the drug testing process, missing three tests within an eighteen month period . . . , possessing substances, trafficking, administering substances to other athletes . . . , encouraging, aiding, abetting, covering up, or any other type of complicity involving an anti-doping rule violation”).
instance, Article 2.2 of the Code provides that the “Use or Attempted
Use by an Athlete of a Prohibited Substance or a Prohibited Method”
constitutes a doping violation.\footnote{87} Whereas an Article 2.1 violation
requires an analytical positive finding,\footnote{88} an Article 2.2 violation may
instead “be established by any \textit{reliable means}.\footnote{89} Such means may
include “admissions by the Athlete, witness statements, documentary
evidence, conclusions drawn from longitudinal profiling, or other
analytical information which does not otherwise satisfy all the
requirements to establish ‘Presence’ of a Prohibited Substance under
Article 2.1.”\footnote{90}

A number of nonanalytical positive cases arose in the wake of
the Bay Area Laboratory Co-Operative (BALCO) doping scandal.\footnote{91}
For instance, in \textit{United States Anti-Doping Agency v. Collins},\footnote{92}
the U.S. Anti-Doping Agency (USADA)\footnote{93} charged track-and-field
athlete Michelle Collins with using a variety of prohibited substances
provided by BALCO, including EPO, testosterone/epitestosterone
(T/E) cream, and tetrahydrogestrinone (THG).\footnote{94} Collins had never
tested positive for a prohibited substance.\footnote{95} Nevertheless, the North
American CAS\footnote{96} relied exclusively on circumstantial evidence and
found “that Collins was guilty of doping through the use of prohibited
substances and techniques.”\footnote{97}

\footnote{87. \textsc{World Anti-Doping Agency}, supra note 2, at 21 (emphasis omitted). This is the
second doping violation enumerated under the Code. \textit{Id.}}
\footnote{88. See supra notes 61–62 and accompanying text.}
\footnote{89. \textsc{World Anti-Doping Agency}, supra note 2, at 21 (emphasis added).}
\footnote{90. \textit{Id.}}
\footnote{91. McLaren, supra note 14, at 10.}
\footnote{92. \textit{U.S. Anti-Doping Agency v. Collins}, AAA No. 30 190 00658 04 (N. Am. Ct. of Arb. for
Sport 2004), http://www.usada.org/files/active/arbitration_rulings/AAA\%20CAS\%20Decision
\%20-%20Collins.pdf.}
\footnote{93. USADA is the national antidoping organization that governs Olympic sports in the
(last visited Oct. 7, 2011).}
\footnote{94. \textit{Collins}, AAA No. 30 190 00658 04, at 2–5.}
\footnote{95. \textit{Id.} at 2.}
\footnote{96. The North American CAS operates as the American Arbitration Association (AAA-
CAS). Straubel, supra note 18, at 1205.}
\footnote{97. \textit{Collins}, AAA No. 30 190 00658 04, at 2. The \textit{Collins} panel initially explained that
“USADA [was seeking] for the first time to sanction an athlete who ha[d] not tested positive in
any of her in-competition or out-of-competition drug tests” and thus that the case presented
“issues that ha[d] not previously had to be decided by Arbitral Tribunals.” \textit{Id.} at 1. The panel,
however, found that “the straightforward application of legal principles to essentially
undisputed facts [led] to a clear resolution of this matter.” \textit{Id.}}
The Collins panel relied primarily upon two sets of indirect evidence of doping: (1) emails from Collins in which she admitted to using prohibited substances and techniques; and (2) blood- and urine-test results indicating fluctuations in Collins’s hematocrit and T/E ratios, which “together provide[d] solid evidence of a pattern of doping.” The panel held that these two categories of circumstantial evidence “independently and collectively” proved Collins’s use of prohibited substances.

In a subsequent nonanalytical positive case, United States Anti-Doping Agency v. M., USADA charged track-and-field athlete Tim Montgomery with using a variety of prohibited substances provided by BALCO. Similarly to Collins, Montgomery had never tested positive for any prohibited substance. Instead, USADA relied exclusively on other direct and circumstantial evidence to argue that Montgomery had committed a doping violation. The panel ultimately found Montgomery guilty of doping based on witness Kelli White’s direct testimony that Montgomery had admitted his use of prohibited substances to her. Nevertheless, the panel declined to “determine whether the mass of other evidence”—including fluctuations in Montgomery’s biological variables—was also conclusive evidence of doping.

98. Id. at 2, 18–24.
99. Id. at 2. Because this case arose before the adoption of the Code, the Collins panel applied the beyond-a-reasonable-doubt standard, id., rather than the comfortable-satisfaction standard mandated under the Code, WORLD ANTI-DOPING AGENCY, supra note 2, at 26.
100. Collins, AAA No. 30 190 00658 04, at 16. With respect to the blood and urine tests specifically, the Collins panel found that “[d]oping is the only potential explanation for the extreme variations in both hematocrit levels and T/E ratios.” Id. at 24. According to the panel, the fluctuations in Collins’s hematocrit levels proved that Collins had used EPO, whereas the variations in her T/E levels could “only be explained by the illegal use of [testosterone/epitestosterone] cream.” Id. at 22. The panel also noted that “Collins did not present any expert’s testimony or any other evidence to provide an alternative explanation of these test results.” Id. at 25.
102. Id. at 1.
103. Id. For example, USADA presented fluctuations in biological variables in Montgomery’s blood and urine as circumstantial evidence of an antidoping violation. Id.
104. The M. panel was “unanimously of the view that Mr. Montgomery in fact admitted his use of prohibited substances to Ms. White.” Id. at 17. The panel characterized this admission as “uncontroversial evidence of . . . a direct and compelling nature.” Id. at 20.
105. Id. at 2.
These and other nonanalytical positive cases have raised new questions regarding the reliability of such evidence and the fairness of finding an athlete guilty of doping in the absence of a positive doping test. Whereas analytical positive cases involve relatively straightforward evidentiary issues, nonanalytical positive cases present more difficult challenges. Because strict liability does not apply, nonanalytical positive cases turn on the “value and weight of the circumstantial evidence and the standard of proof that will be applied to evaluate this evidence.” Unfortunately, there has been “little guidance regarding . . . how much [evidence] is enough to convict an athlete of a doping offense” in the absence of a positive doping test. Although nonanalytical positive cases may provide a valuable “new tool in the fight against doping,” it is also important to balance the interest in conducting this fight with the fundamental rights of accused athletes.

III. CYCLING’S BIOLOGICAL PASSPORT: A NEW COURSE IN THE RACE AGAINST DOPING IN SPORT

Cycling’s biological passport marks a departure from traditional antidoping efforts and signals an aggressive new approach to pursuing nonanalytical positive cases. The biological passport is an

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106. Myler, supra note 86, at 751–52; see also Nafziger, supra note 67, at 47 (encouraging “critical thinking about the alternatives to a reliance on hard, laboratory evidence” in nonanalytical positive cases).

107. Nafziger, supra note 67, at 47 (“Arguably, the circumstantial nature of the evidence, because of its indirectness, may be unreliable and unfair.”).

108. See supra notes 68–72 and accompanying text.


110. Foschi, supra note 60, at 481. Unfortunately, the Collins and M. decisions provided “virtually no guidance on what must be proven in an entirely circumstantial evidence case involving a non-analytical positive.” McLaren, supra note 84, at 212.

111. See Schmalzer, supra note 75, at 700 (“[A]nti-doping organizations must bear in mind that for every rule and new testing method imposed on athletes, the rights of those same athletes are curtailed.”).

112. This characterization is somewhat of an oversimplification. In fact, antidoping organizations have long employed methods of indirect detection in addition to methods of direct detection. For instance, WADA explicitly authorizes the monitoring of T/E ratios to indirectly detect the use of prohibited substances. WORLD ANTI-DOPING AGENCY, GUIDELINE: REPORTING AND MANAGEMENT OF ELEVATED T/E RATIOS 3 (2006), available at http://www.wada-ama.org/Documents/Resources/Guidelines/WADA_Guidelines_ReportManagementElevatedTERatios_EN.pdf. In many ways, cycling’s biological passport is simply a variation on earlier, indirect antidoping tests, such as the T/E ratio. Moreover, many of the criticisms levied against the T/E ratio apply with similar force to cycling’s biological passport. See, e.g., James E.
individual, electronic profile that collates various biological parameters in a cyclist’s blood and urine. Using these data, antidoping authorities monitor an individual cyclist’s natural biological variables for fluctuations that are thought to indirectly reveal doping. Based on this analysis, the UCI may decide to initiate disciplinary proceedings against a cyclist for doping.

Cycling’s biological passport is therefore premised on a theory of indirect detection. The biological passport “doesn’t follow products, but the athlete,” making it unnecessary to develop a new test for every prohibited substance or method of doping. Instead of relying on a positive doping test or other direct or circumstantial evidence of doping, the UCI may initiate antidoping proceedings against a cyclist solely on the basis of inferences drawn from fluctuations in that cyclist’s biological variables. Although Pat McQuaid, UCI president, heralded this approach as “a new and historic step in the fight against doping,” this method raises serious concerns.

A. The Genesis of Cycling’s Biological Passport

WADA initially conceived of the biological passport in 2002. In January 2008, the UCI became the first IF to implement a


115. See supra note 15.

116. UNION CYCLISTE INTERNATIONALE, supra note 12, at 20.

117. Id. at 16 (“With the biological passport, the direct detection of substances is not the primary focus, but rather the effect of these substances on the body. . . . This is called indirect detection.”).


120. Questions & Answers, supra note 114. As has been the case with many antidoping initiatives, the program did not gain momentum until a major doping scandal several years later. At the 2006 Olympics in Turin, a dozen cross-country skiers were suspended from competition
biological-passport program. The UCI formally incorporated the biological passport into its antidoping rules in June 2008, enabling the antidoping authority to begin sanctioning cyclists for doping on the basis of indirect biological-passport evidence.

Under cycling’s biological passport, professional cyclists may be required to submit to mandatory blood and urine tests at any time, both in and out of competition. In the first five months of 2008, the UCI took 3,185 blood and urine samples from more than 850 professional cyclists. The UCI then analyzed these initial samples to create the longitudinal blood and steroid profiles in each cyclist’s biological passport. These profiles established the cyclist’s individual parameters for various biological variables, such as hemoglobin, reticulocytes, and hematocrit, all of which are found in the blood.

Using these profiles, the UCI can compare an individual cyclist’s subsequent blood and urine samples against the historical parameters contained in that cyclist’s biological passport. Based on this comparison, the UCI may conclude that fluctuations in a cyclist’s blood profile are abnormal and likely indicate prohibited blood because of excessive levels of hemoglobin in their blood. Lynn Zinser & Juliet Macur, Pomp and Unsettling Circumstances Open Games, N.Y. TIMES, Feb. 11, 2006, at D1. Although these elevated levels may have indicated blood doping, the athletes maintained that their hemoglobin levels were natural. Id. Following this episode, WADA financed a research program to explore the possibility of developing a biological passport. Macur, supra note 8.


122. Press Release, Union Cycliste Internationale, UCI Management Committee Meeting in Denmark (June 13, 2008), available at http://www.uci.ch/Modules/ENews/ENewsDetails.asp?id=NTg0Nw. The UCI also adopted a no-start rule, meaning that a cyclist could be prevented from starting a race for fifteen days based on his biological passport. UCI Votes To Incorporate Biological Passport in Fight Against Doping, ASSOCIATED PRESS, June 13, 2008, available at Factiva, Doc. No. APRS000020080613e46d008ge.

123. Cyclists are required to provide the UCI with a detailed schedule of their whereabouts through the Anti-Doping Administration & Management System (ADAMS) program. UNION CYCLISTE INTERNATIONALE, supra note 12, at 19. This requirement enables the UCI to test cyclists at any time. Id.


125. UNION CYCLISTE INTERNATIONALE, supra note 12, at 15.

126. Id. at 16.


128. UNION CYCLISTE INTERNATIONALE, supra note 12, at 18–19.
manipulation, such as blood doping. Similarly, the UCI may determine that irregularities in a cyclist’s steroid profile reveal that the cyclist has taken exogenous steroids, such as testosterone, that may not have been detected by traditional tests.

Biological passports are monitored using a two-step process. First, each blood or urine sample is analyzed and then applied against a statistical model that uses Bayesian inference techniques to compare the individual sample against the cyclist’s historical parameters. If there are fluctuations in a cyclist’s biological parameters that exceed the thresholds set by the statistical model, the model makes the initial determination that the cyclist is likely to have committed a doping violation. This determination is based not on a “true probability of doping,” but instead on “how the profile differs from what is expected in clean athletes.”

Second, any biological-passport data that might indicate doping are submitted to a UCI panel of three antidoping experts for further review. These experts interpret the data to determine whether the fluctuations in a cyclist’s biological variables indirectly show that the cyclist has committed a doping violation. The panel then issues a recommendation as to whether the UCI should take formal action, such as initiating disciplinary proceedings against the cyclist for doping.

129. Id. at 16.
130. Id. The UCI has not yet fully implemented the steroid profile. Thus far, it has relied exclusively on blood-profile fluctuations in prosecuting all biological-passport cases. Biological Passport—Questions/Answers, supra note 13.
131. Union Cycliste Internationale, The Biological Passport: A New Element in “100% Against Doping,” ASS’N OF NAT’L ANTI-DOPING ORGS., 20–21 (Mar. 31, 2008), http://www.anado.org/documents/UCI.pdf. The Bayesian model makes a “statistical inference in which evidence or observations are used to update or to newly infer the probability that a hypothesis [of doping] may be true.” Id. at 21 (emphasis omitted).
133. Id. (internal quotation marks omitted).
134. Ryan, supra note 1.
135. The Athlete Biological Passport, supra note 132.
136. UNION CYCLISTE INTERNATIONALE, supra note 12, at 20.
The UCI has discretion as to whether to initiate such proceedings. 137 If the UCI opts to pursue enforcement on the basis of indirect biological-passport evidence, it will provisionally suspend the accused cyclist from competition and formally request that the relevant NGB sanction the cyclist for doping. 138 The accused cyclist has the right to a hearing before his NGB. 139 At the conclusion of that proceeding, the NGB will determine whether the cyclist is guilty of doping and, if necessary, will impose sanctions. 140 WADA, the UCI, and the accused cyclist then have the right to appeal the NGB’s decision to the CAS, 141 which will render a final decision. 142

B. The First Cases Arising Under Cycling’s Biological Passport

In 2009 and 2010, the UCI opened the first antidoping cases based on cycling’s biological passport. The UCI initiated two waves of disciplinary proceedings against a total of eight cyclists suspected of doping solely on the basis of fluctuations in their biological passports. In these cases, the cyclists’ NGBs initially disagreed with one another over the reliability of such evidence in proving doping violations. In the four cases that were appealed, however, CAS panels consistently upheld the doping sanctions. The CAS therefore signaled a broad willingness to accept indirect biological-passport evidence as proof of doping.

1. NGBs Split on the Reliability of Cycling’s Biological Passport. NGBs initially split in antidoping cases arising under cycling’s biological passport. In the first wave of proceedings involving indirect biological-passport evidence, NGBs appeared to signal their broad support for the program by unanimously upholding doping sanctions. In the second wave of proceedings arising under the program, however, NGBs voiced concerns over the reliability of indirect biological-passport evidence and subsequently declined to uphold doping sanctions based on such evidence alone.

137. See UNION CYCLISTE INTERNATIONALE, supra note 21, at 41 ("[T]he UCI shall conclude whether an anti-doping violation has apparently been committed."); id. at 42 ("[T]he UCI may reopen the case on its own initiation.").
138. See infra notes 150–156 and accompanying text.
139. See supra note 63 and accompanying text.
140. See supra notes 23, 51 and accompanying text.
141. See supra note 55 and accompanying text.
142. See supra note 56 and accompanying text.
In the first wave of antidoping proceedings, NGBs unanimously upheld the UCI’s sanctions. In June 2009, the UCI provisionally suspended five cyclists—Spaniards Igor Astarloa Ascasibar, Ruben Lobato Elvira, and Ricardo Serrano Gonzalez and Italians Pietro Caucchioli and Francesco De Bonis—on the basis of “information provided by the blood profile in [the cyclists’] biological passports.”143 Subsequently, the UCI formally requested that the Spanish and Italian NGBs open disciplinary proceedings against the five accused cyclists.144 The cyclists vigorously maintained their innocence, arguing that they had not tested positive for any prohibited substances.145 Although the cyclists were not major names in the sport,146 the UCI called the announcement a “very important step in the battle against doping”147 and a “significant breakthrough” for the biological passport.148 The cyclists faced minimum two-year bans from their NGBs, but the UCI announced that it would seek four-year bans in an effort to demonstrate its confidence in the strength of the cases.149

The Italian and Spanish NGBs ultimately found all five cyclists guilty of doping. In May 2010, De Bonis became the first cyclist to be sanctioned for a doping violation based solely on indirect biological-passport evidence when the National Anti-Doping Tribunal of the Italian Anti-Doping Department (CONI) levied a two-year suspension and a €13,000 fine against him.150 The UCI emphasized the

145. For example, De Bonis insisted, “All the tests I have done throughout the year, including the Giro d’Italia, have been all negative. . . . [A]ll of my samples taken at home. . . . were all negative.” Gregor Brown, UCI Names First Five Biological Passport Violators, CYCLING NEWS (June 17, 2009, 11:00 AM), http://www.cyclingnews.com/news/uci-names-first-five-biological-passport-violators (quoting De Bonis) (internal quotation marks omitted).
146. Pretot, supra note 144.
147. Press Release, Union Cycliste Internationale, supra note 143.
149. UCI Calls for Doping Charges Against 5 Riders, ASSOCIATED PRESS, June 17, 2009, available at Factiva, Doc. No. APRS000020090617e56h001ja.
“historic importance of this first judgment under the scope of the biological passport” program.\(^{151}\)

Subsequently, in June 2010, the CONI tribunal imposed a two-year ban on Caucchioli.\(^{152}\) Then, the Disciplinary Commission of the Spanish RFEC announced a two-year suspension and a €23,100 fine for Serrano in June 2010\(^ {153}\) and a two-year ban for Lobato in July 2010.\(^ {154}\) Finally, the RFEC tribunal levied a two-year suspension and a €35,000 fine against Astarloa in December 2010,\(^ {155}\) despite the fact that the cyclist had retired from the sport the previous year.\(^ {156}\) These initial decisions appeared to signal the Italian and Spanish NGBs’ willingness to accept indirect biological-passport evidence as proof of doping.

In the second wave of antidoping proceedings, however, multiple NGBs declined to impose doping sanctions and instead questioned the scientific and legal validity of indirect biological-passport evidence. In May 2010, the UCI provisionally suspended three cyclists—Italian Franco Pellizotti, Spaniard Jesus Rosendo Prado, and Slovenian Tadej Valjavec—and requested that their respective NGBs initiate disciplinary proceedings against them.\(^ {157}\) The cyclists

\(^{151}\) Id.


\(^{153}\) In addition to fluctuations in his biological-passport variables, Serrano was found guilty of doping based on a later analytical positive finding of prohibited recombinant EPO (CERA) in his blood. Press Release, Union Cycliste Internationale, Biological Passport: Ricardo Serrano Gonzalez Sanctioned (June 17, 2010), available at http://www.uci.ch/Modules/ENews/ENewsDetails.asp?id=NjkyMw.


\(^{156}\) Astarloa was exasperated, saying, “It seems absurd to me. . . . [E]ven when you’re retired, they don’t leave you in peace. I could say I don’t care, because I’m no longer a cyclist . . . . but . . . it’s unjust. They controlled me a thousand time [sic], any hour, any place, and I was never positive.” Astarloa Calls Sanctions “Absurd and Ridiculous,” CYCLING NEWS (Dec. 2, 2010, 2:13 PM), http://www.cyclingnews.com/news/astarloa-calls-sanctions-absurd-and-ridiculous (quoting Astarloa) (internal quotation marks omitted).

vehemently denied any wrongdoing. Pellizotti was the first prominent cyclist accused of a doping violation based on indirect biological-passport evidence, and his suspension was viewed as signaling that the UCI was finally getting “serious about rooting out dopers.”

In July 2010, a disciplinary panel of Slovenia’s National Anti-Doping Commission (NADC) became the first NGB to question the reliability of indirect biological-passport evidence when the panel declined to impose doping sanctions against Valjavec. In its decision, the NADC panel broadly rejected evidence from Valjavec’s biological passport, finding that his profile provided insufficient proof of prohibited blood doping. Instead, the panel accepted Valjavec’s argument that his biological-passport anomalies could have been caused by a variety of physiological factors other than blood doping, such as bleeding due to a stomach ulcer, training at high altitudes and in a hypobaric chamber, and corticoid treatment following a wasp sting. Specifically, the NADC panel found that “the statistical methods adopted by the biological passport cannot demonstrate the use of doping techniques but only evidence eventual unusual value[s] that could be explained by physiological origins.” Moreover, the NADC panel held that the UCI had “failed to prove that the model of the biological passport had been used correctly and that it factored in variables, such as the type of instrument and altitude at which

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158. Valjavec was stunned by the announcement, saying, “I can’t believe how it is possible that the system does not work and that this can happen.” Susan Westemeyer, Valjavec Claims Innocence in Biological Passport Case, CYCLING NEWS (May 4, 2010, 2:30 PM), http://www.cyclingnews.com/news/valjavec-claims-innocence-in-biological-passport-case (quoting Valjavec) (internal quotation marks omitted).

159. Juliet Macur, Blood Profile Is Foundation for Barring of Cyclist, N.Y. TIMES, May 8, 2010, at D3. Pellizotti’s Team Liquigas fired back, arguing that “[t]he evidence which has been presented [through the biological passport] does not seem to scientifically prove with certainty any improper conduct by the athlete.” Id. (quoting a statement by Team Liquigas) (internal quotation mark omitted).


161. Id.


163. Id.
Valjavec had trained.” As a result, the NADC panel declined to impose doping sanctions against Valjavec.

In October 2010, a CONI tribunal likewise rejected indirect biological-passport evidence and declined to impose doping sanctions against Pellizotti. Pellizotti maintained his innocence before the CONI panel, and several hematological experts testified on his behalf. Dr. Roberto Corsetti, Pellizotti’s Team Liquigas doctor, testified that Pellizotti’s biological-passport fluctuations could be explained by natural causes, including altitude training, that the “math formula [of the biological passport] does not take into consideration.” Dr. Giancarlo Isacchi, an independent expert witness for the CONI tribunal, similarly argued that anomalies in Pellizotti’s biological passport did not yield “a significant probability” that Pellizotti had engaged in doping. In perhaps a surprising change of course from its pair of decisions only a few months earlier, the CONI panel ultimately held that the evidence from Pellizotti’s biological passport did not establish “a sufficient probability of guilt” of doping. As a result, the panel dismissed the UCI’s case for lack of evidence and fined the UCI €5,000 in court costs. Following the decision, Pellizotti announced that he planned to seek €200,000 in damages from the UCI.

164. Cyclist Valjavec Cleared of Doping Charges, supra note 160.
165. Id.
167. Id. (alteration in original).
168. Id.
169. See supra notes 150–152 and accompanying text.
170. Andrew Dampf, Italian Cyclist Franco Pellizotti Cleared of Doping in Biological Passport Case, ASSOCIATED PRESS, Oct. 21, 2010, available at Factiva, Doc. No. APRS000020101021e6a001am; see also Italian Cyclist Cleared in Suspected Drug Case, AGENCE FRANCE-PRESSE, Oct. 21, 2010, available at Factiva, Doc. No. AFPR000020101021e6a006n3 (reporting that the court had held that a “sufficiently high level of probability of guilt wasn’t established” and had “absolve[d] the rider of the charge”).
171. Italian Cyclist Cleared in Suspected Drug Case, supra note 170.
Finally, Rosendo never faced disciplinary proceedings for his alleged doping violation. Rosendo’s Andalucia-Cajasur team announced that the irregularities in the cyclist’s biological passport had likely been caused by abundant bleeding due to a hemorrhoid. As a result, the RFEC declined the UCI’s request to open disciplinary proceedings against Rosendo. Collectively, these decisions cast doubt on the future of cycling’s biological passport.

2. The CAS Accepts Indirect Biological-Passport Evidence. Whereas NGBs initially disagreed over the reliability of cycling’s biological passport, the CAS subsequently signaled a broad willingness to accept indirect biological-passport evidence by upholding doping sanctions against cyclists. The CAS heard appeals in four of the initial eight biological-passport cases. Caucchioli became the first cyclist to challenge the validity of the biological-passport program before a CAS panel in December 2010. CAS panels also heard appeals in the Valjavec, De Bonis, and Pellizotti cases in early 2011. In each case, the CAS panel ultimately upheld the imposition of doping sanctions based on indirect biological-passport evidence.

In March 2011, the CAS found both Caucchioli and Pellizotti guilty of doping based on indirect biological-passport evidence

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175. Id.
176. Id.
177. Juliet Macur, Ban Based on Blood Profile Is Upheld, N.Y. TIMES, Mar. 9, 2011, at B16 (noting that “cycling’s biological passport program seemed to be on shaky ground”).
178. CAS Sets Court Dates for Riders De Bonis, Pellizotti To Challenge Cycling’s Anti-Doping Scheme, ASSOCIATED PRESS, Feb. 18, 2011, available at Factiva, Doc. No. APRS000020101221e6c10029u.
180. The CAS heard the UCI’s appeal of the NADC tribunal’s decision in the Valjavec case in January 2011. Id.
alone. In the Caucchioli case, the CAS panel held that “the strict application of [the biological passport] could be considered as a reliable means of detecting indirect doping methods.”\(^\text{185}\) Moreover, the CAS panel found that “the ‘irregularities’ put forward by [Caucchioli] could not have affected the results” reflected in the cyclist’s biological passport.\(^\text{185}\) Therefore, the CAS panel found that the UCI had “successfully established the use of prohibited doping methods,” and it affirmed the CONI tribunal’s decision to impose a two-year ban on Caucchioli.\(^\text{186}\)

In the Pellizotti case, the CAS panel overturned the CONI panel’s decision clearing Pellizotti and instead found the cyclist guilty of doping.\(^\text{187}\) The CAS panel found that fluctuations in Pellizotti’s biological passport were sufficient to prove the cyclist had engaged in prohibited blood doping.\(^\text{188}\) As a result, the CAS panel suspended Pellizotti for two years, disqualified his race results dating back to May 2009, and fined him €115,000.\(^\text{189}\) The UCI and WADA hailed these decisions as broadly vindicating cycling’s biological passport.\(^\text{190}\)


\(^\text{184}\). Id.

\(^\text{185}\). Id.

\(^\text{186}\). Id. at 2.

\(^\text{187}\). Id.

\(^\text{188}\). Id.

\(^\text{189}\). Graham Dunbar, UCI Wins Landmark Anti-Doping Verdicts as CAS Bans Italian Riders Pellizotti, Caucchioli, ASSOCIATED PRESS, Mar. 8, 2011, available at Factiva. Doc. No. APRS000020110308e738002go; see also Press Release, Court of Arbitration for Sport, supra note 183, at 1 (“[T]he CAS Panel has reviewed in detail the biological passport program applied by the UCI and has found that the strict application of such program could be considered as a reliable means of detecting indirect doping methods.”).

In April 2011, the CAS similarly found Valjavec guilty of doping based on indirect biological-passport evidence.\textsuperscript{191} The CAS reversed the NADC panel’s initial decision clearing Valjavec and instead levied a two-year suspension against the cyclist, disqualified his race results between April 2009 and September 2009, and fined him €52,500.\textsuperscript{192} The CAS panel concluded that “anti-doping tests performed in April and August 2009 revealed abnormalities in the context of the athlete’s biological passport to a degree which was entirely consistent with blood manipulation.”\textsuperscript{193} Moreover, the CAS panel explicitly “confirmed the reliability of the indirect method of detection based on the blood profile of athletes . . . .”\textsuperscript{194} Subsequently, the UCI announced that it was “extremely satisfied because this CAS verdict [had] once again given support to the reliability of the biological passport.”\textsuperscript{195}

Finally, in June 2011, the CAS dismissed De Bonis’s appeal and upheld the CONI tribunal’s doping sanctions against the cyclist.\textsuperscript{196} In doing so, the CAS again confirmed its position that the biological passport is “a reliable means of proving an anti-doping violation.”\textsuperscript{197}

Although CAS panels are not necessarily bound by the precedent of prior arbitration proceedings or obliged to obey the rules of stare decisis,\textsuperscript{198} the CAS has signaled a broad willingness to accept indirect biological-passport evidence in finding cyclists guilty of doping, and subsequent CAS panels will likely continue to uphold such sanctions.\textsuperscript{199}

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Graham Dunbar, \textit{Slovenia’s Valjavec Gets 2-Year Ban for Doping, Gives UCI 3rd Biological Passport Win at CAS}, ASSOCIATED PRESS, Apr. 22, 2011, available at Factiva, Doc. No. APRS000020110422e74m00ls9 (internal quotation marks omitted).
\item Id.
\item Id.
\item Italian Rider De Bonis Loses Doping Ban Appeal, ASSOCIATED PRESS, June 22, 2011, available at Factiva, Doc. No. APRS000020110622e76m001hv.
\item Id.
\item Connolly, \textit{supra} note 17, at 197.
\item Over the past decade, there has been general agreement among CAS arbitrators that CAS panels should typically follow the reasoning of previous panels. \textit{Id.} Nevertheless, CAS panels may diverge from prior reasoning in cases in which “there are compelling reasons in the interest of justice” to do so. \textit{Id.}
\end{enumerate}
\end{footnotesize}
IV. CONCERNS PRESENTED BY CYCLING’S BIOLOGICAL PASSPORT

Despite the CAS’s initial support for cycling’s biological passport, serious questions persist as to the reliability of indirect biological-passport evidence and the validity of its application in antidoping cases. In turn, these uncertainties raise concerns over the fundamental fairness of sanctioning cyclists for doping on the basis of their biological passports alone. These unresolved issues should give future CAS panels pause before those panels uphold doping violations based solely on cycling’s biological passport.

A. Continuing Uncertainty Regarding Indirect Biological-Passport Evidence

Debate persists over the reliability of indirect biological-passport evidence and the clarity, consistency, and transparency of its application in prosecuting cyclists for doping violations. This uncertainty undermines the validity of using biological-passport evidence as the sole basis for doping violations.200

First, it is not clear that the biological passport provides reliable evidence that a cyclist has committed a doping violation. Cycling’s biological passport is based on a statistical model201 that analyzes fluctuation in a cyclist’s biological variables and makes a threshold determination as to whether that cyclist is likely to have committed a doping violation. This analysis, however, is inherently uncertain.202 The model can only point to a likelihood of doping203—it cannot definitively establish a doping violation.204 Moreover, the science

200. See Nafziger, supra note 67, at 47 (characterizing the “reliability of this approach” as “highly controversial”).
201. See supra notes 131–133 and accompanying text.
202. The Athlete Biological Passport, supra note 132 (noting the “uncertainties associated with the inferences that may be drawn from evidentiary values”).
203. Id. (“[T]he decision rule [under the biological passport] is not based on a true probability of doping, but rather on how the profile differs from what is expected in clean athletes. This conceptual difference is well known in forensics for the evaluation of scientific evidence: to sentence an athlete solely from a high level of specificity would be a fallacy of statistical reasoning that results from misunderstanding the idea of multiple testing. A high number of anti-doping tests simply elevates the likelihood of finding a positive by pure chance alone.” (internal quotation marks omitted)).
204. Ann Gripper, then-manager of the UCI’s Anti-Doping Service, explains that the biological passport allows the UCI to “make a determination as to the likelihood of doping based on that rider’s individual profile” but acknowledged that the Anti-Doping Service “may not actually be able to say what it is, whether it’s autologous blood transfusions or micro-dosing with EPO.” John Wilcockson, The New Passport: A Conversation with Anne Gripper,
underlying the biological passport continues to be refined. Questions remain regarding the statistical model’s ability to accurately distinguish between biological fluctuations that should be considered normal and those that may signal doping, especially among the small and atypical population of elite professional cyclists. The model may also be unable to differentiate between fluctuations caused by doping and those that result from some other cause, such as permitted altitude training or a cyclist’s preexisting medical condition.

As a result, antidoping experts debate the reliability of biological-passport evidence in signaling doping. Although the UCI maintains that its statistical model is capable of determining a doping violation “with a degree of certainty sufficient to commence disciplinary proceedings,” others dissent. For instance, Dr. Max VeloneWS (Oct. 24, 2007, 1:00 AM UTC), http://velonews.competitor.com/2007/10/news/the-new-passport-a-conversation-with-anne-gripper,13563 (quoting Gripper). The Athlete Biological Passport, supra note 132 (“Empirical evidence on a high number of non-doped, control subjects is primordial since a high specificity—to avoid to falsely accuse an innocent—is required in an anti-doping setting.”); Barry Ryan, Testa and BMC Weigh In Behind Biological Passport, CYCLING NEWS (Mar. 2, 2011, 4:28 PM), http://www.cyclingnews.com/news/testa-and-bmc-weigh-in-behind-biological-passport (“The main concern I have as a physician is that the variation [of blood values] can be huge. We don’t know what the variability is in this specific population [of professional cyclists], as they train a lot and travel a lot, so maybe their variations are not exactly the same as those of average people. Most of the studies [that antidoping authorities] use to support [cycling’s biological passport] are done on athletes, but not athletes to this extreme level of fitness.” (quoting Dr. Max Testa) (internal quotation marks omitted)).
Testa, the BMC Racing Team doctor, believes that a “margin of uncertainty” remains in biological-passport cases and has warned that the program is still in the process of being refined.210 Similarly, Dr. Roberto Corsetti, the Team Liquigas doctor, has argued that the “variations in most cases . . . are debatable.”211 Others have gone even further in their criticism. Dr. Nicolaas Faber and Dr. Bernard Vandeginste have concluded that the model underlying cycling’s biological passport is “clearly flawed,” “overly simplistic,” and “misleading.”212 As a result, they assert that the “information gathered in the biological passport is grossly incomplete and, therefore, prosecution on the basis of the biological passport lacks a sound logical foundation.”\(^{213}\)

Second, serious concerns exist regarding the clarity, consistency, and transparency of the expert review of biological-passport data. Once the statistical computer model determines that fluctuations in a cyclist’s biological passport are likely to signal a doping violation, that cyclist’s data are submitted to a panel of three experts for further interpretation.215 Although this expert review is supposed to address the shortcomings of the statistical model,216 the review process presents problems of its own.

to a number of recent developments, it is possible today to obtain data with sufficient sensitivity and specificity to launch disciplinary action in certain cases on the sole basis of indirect blood markers.”).

210. Ryan, supra note 206.
211. Brown, supra note 166.
213. Id.; see also Klaas Faber & Marjan Sjerps, Anti-Doping Researchers Should Conform to Certain Statistical Standards from Forensic Science, 49 SCI. & JUST. 214, 215 (2009) (“Any claim by the prosecution about the likelihood of the truth of a hypothesis lacks a sound logical foundation.”).
214. Antidoping authorities should make an effort to apply their antidoping controls clearly, consistently, and transparently. See Connolly, supra note 17, at 198 (“To continue to settle doping cases fairly, CAS must ensure that all parties who come before its arbitration panels trust in both the clarity of anti-doping rules and the consistency in their application.”).
215. UNION CYCLISTE INTERNATIONALE, supra note 12, at 20.
216. See The Athlete Biological Passport, supra note 132 (“The role of this panel of experts is not only to protect the athlete’s right to a qualified review prior to the possible assertion of an anti-doping rule violation, but it also ensures that all possible factors, causes and events are considered thoroughly.”).
For instance, few clear standards seem to guide the expert review of biological-passport data. Instead, according to Dr. Michael Ashenden, a member of the UCI’s biological-passport panel, each panel member has the discretion to “examine whatever markers he or she chooses” in reviewing the data. Whereas objective standards would ensure some degree of consistency, this subjective review is likely to result in inconsistent outcomes.

Similarly troubling is the fact that only three of the nine panel members review any given set of irregular biological-passport data. Dr. Giuseppe D’Onofrio, another member of the UCI’s biological-passport panel, believes that this format may undermine the accuracy and consistency of the data review. Requiring all nine panel members to examine biological-passport fluctuations would ensure a more robust review of the data.


219. Dr. Testa has acknowledged the subjective nature of this review. “To be honest, I like to see some kind of fluctuations because that is the way it should be,” he explained. Ryan, supra note 206 (quoting Dr. Testa) (internal quotation marks omitted). “The problem is how we interpret the variation—is a stable number good or is it bad? Sometimes it’s better to see some variation rather than someone always at the same number, because you can think that that is also the result of manipulation. We’re just learning.” Id. (quoting Dr. Testa) (internal quotation marks omitted).

220. Antidoping programs should promote consistency. Schmalzer, supra note 75, at 689 (“Inconsistencies and questionable behavior on the part of anti-doping organizations and laboratories undermine the credibility of the anti-doping effort.”).

221. Ryan, supra note 1.

222. Dr. Giuseppe D’Onofrio said, “I don’t agree that it should be groups of only three experts evaluating the profiles . . . . All nine of used [sic] should be involved together in order to arrive at a broadly unanimous decision.” Id. (quoting Dr. D’Onofrio) (internal quotation marks omitted).

223. According to Dr. Giuseppe Banfi, a hematological expert, “Involving all nine experts on the panel would mean the procedures were sounder and more stable.” Id. (quoting Dr. Banfi) (internal quotation marks omitted). Others have gone further. Federico Scaglia, secretary of the Italian Professional Cyclists Association, has formally requested that “the UCI no longer filter the selection of the athletes’ profiles and that all nine experts have the data of
Furthermore, the review process lacks transparency.224 Because the evaluation of biological-passport data requires a high level of technological sophistication, this analysis has become “increasingly black boxed” and closed to outside review.225 Dr. Giuseppe Banfi, a hematological expert, has observed that “there is a closed attitude from a scientific point of view as the [biological passport] system is self-referential.”226 Although the UCI counsels cyclists and NGBs to simply “trust the review that has been conducted by [the UCI’s] experts,”227 this admonition provides little solace to cyclists accused of doping solely on the basis of fluctuations in their biological passports.228

B. The Unfairness of Cycling’s Biological Passport

The unresolved questions regarding both biological-passport data and the process by which these data are reviewed raise a related set of concerns over the fairness of finding cyclists guilty of doping on the basis of indirect biological-passport evidence alone.229

224. Antidoping programs should foster transparency. Connolly, supra note 17, at 199 (“[I]t is incumbent upon the sporting bodies to do everything in their power to promote a fair, transparent, and trustworthy system.”).

225. Rayvon Fouché, Cycling’s “Fix,” 33 J. SPORT & SOC. ISSUES 97, 98 (2009) (“The biological passport and the number of doping cases have moved the enforcement location of clean athletic performance deeper into the scientific laboratory. The processes by which clean performance is determined is getting increasingly black boxed by the technological sophistication of the diagnostic tools and instruments and the breadth of scientific knowledge required to interpret these samples, observations, and data.”).

226. Ryan, supra note 1.

227. Daniel Benson, Exclusive: Anne Gripper Breaks Silence on Blood Passport, CYCLING NEWS (June 18, 2009, 10:42 AM), http://www.cyclingnews.com/features/exclusive-anne-gripper-breaks-silence-on-blood-passport (“What we’re expecting them to understand is that we have the best experts in the world and that they’ve reviewed the data properly.” (quoting Anne Gripper, then-manager of the UCI’s Anti-Doping Service) (internal quotation marks omitted)).

228. In response to questions regarding the transparency of cycling’s biological passport, at least one cyclist has called for all biological-passport data to be made publicly available. Daniel Benson, Wiggins Calls for Biological Passport Data To Be Made Public, CYCLING NEWS (Jan. 19, 2011, 10:53 AM), http://www.cyclingnews.com/news/wiggins-calls-for-biological-passport-data-to-be-made-public.

229. Considering this uncertainty, Dr. Testa has said, “I’m not sure if I would use the [biological passport] parameters to say a guy is doing something . . . .” Ryan, supra note 206 (alteration in original) (quoting Dr. Testa) (internal quotation mark omitted).
Antidoping policy requires a careful balancing of competing goals. There is little doubt that “[d]oping is fundamentally contrary to the spirit of sport.” Antidoping authorities serve a noble function, promoting “health, fairness and equality” by protecting the rights of all athletes “to participate in doping-free sport.” The UCI has taken important steps toward eliminating doping from professional cycling, a sport often regarded by more cynical commentators as “a competition between pills, not skills.”

At the same time, however, the need to effectively police sport for doping must be weighed against the fundamental rights of individual athletes. Although athletes agree to be bound by the rules that govern their sports, antidoping authorities must apply these rules fairly in light of all that is at stake for athletes accused of doping. The mere allegation of doping can have a devastating impact on an athlete. Finding an athlete guilty of doping can ruin...
that athlete’s career: he may be banned from his sport, fined enormous sums of money, and even subjected to criminal liability.

Therefore, antidoping authorities must “walk a fine line” between pursuing means of eliminating doping from sport and protecting the fundamental rights of individual athletes. In weighing these competing interests, antidoping bodies confront difficult challenges. Never are these challenges greater than when considering whether to implement a new antidoping technology. Cutting-edge technologies offer great promise in the fight against doping, but the science underlying such technologies must be sufficiently refined to protect innocent athletes from false accusations. These competing interests require a “delicate balance.”

Finding cyclists guilty of doping solely on the basis of their biological passports threatens to upset this delicate balance. The unresolved questions regarding the validity of cycling’s biological passport and the critically important rights at stake for cyclists counsel a cautious approach. Antidoping authorities should not accuse athletes of doping unless “the possibility of a false positive is

237. Under cycling’s biological passport, “the mere inference of doping, created by a deviation from the baseline, would be all that is required to ruin an athlete’s career.” Schmalzer, supra note 75, at 698.
238. See id. at 677 (“Losing faith in either [of these goals] will undermine the very purpose of drug testing, which is to protect the rights of athletes and maintain a sense of equality and fairness in competition.”).
239. See Nafziger, supra note 67, at 55 (“The difficult question is: in the interest of a level playing field for all athletes, to what extent should we run the risk of abandoning a traditional reliance on hard laboratory data to justify the imposition of essentially penal sanctions against athletes?”).
240. See Connolly, supra note 17, at 167–68 (“Despite the need to launch new methods as quickly as possible in order to thwart cheaters, WADA and other organizations must not prematurely introduce new testing methods. They must [instead] exercise caution before approving a testing method because of the potentially devastating consequences to the image of anti-doping programs in general if an athlete were to be prosecuted on the basis of a false positive test resulting from an unreliable method.”).
241. Id. at 169 (“The sporting world has a significant interest in implementing new testing techniques that will discourage the use of performance-enhancing substances and expose cheaters as quickly as possible. But sport also has an interest in making sure that the reliability of these testing methods is unquestionable.”).
242. Id.
243. See Foschi, supra note 60, at 485 (“[G]reat precaution must be taken to ensure that the desire to rid the sport of cheaters does not carelessly allow innocent athletes to bear the same label without the same fault.”).
Before aggressively pursuing future doping sanctions on the basis of indirect biological-passport evidence, the UCI would be wise to reassess whether such efforts adequately balance the interest in eliminating doping from sport against the fundamental rights of individual cyclists. Failing to balance these equally important goals may serve to undermine—rather than bolster—the integrity of the sport.\footnote{Connolly, supra note 17, at 169.}

V. RECOMMENDATIONS FOR IMPROVING CYCLING’S BIOLOGICAL PASSPORT

Despite these concerns, there are a number of less problematic ways in which antidoping authorities can use cycling’s biological passport as an effective antidoping control. First, the UCI should use the biological passport primarily as a basis for instituting intelligent, targeted testing against cyclists who exhibit irregularities in their biological-passport variables. Second, WADA and the CAS should make the standard of proof more stringent in cases in which allegations of doping rest solely on indirect biological-passport evidence. Each of these alternatives would effectively ameliorate the existing flaws in cycling’s biological passport.

A. Using Cycling’s Biological Passport for Targeted Testing

The UCI should use cycling’s biological passport primarily as a basis for instituting intelligent, targeted testing against cyclists with irregular fluctuations in their biological-passport profiles, rather than pursuing doping violations on the basis of those cyclists’ biological-passport data alone.\footnote{See Foschi, supra note 60, at 476 (noting that overly aggressive antidoping policy may be “offensive to the very spirit of the sport that WADA and the Olympic Movement seek to develop and protect”).}

\footnote{See UCI Anti-Doping Programme, supra note 46 (describing the ways in which the UCI already employs targeted testing in its antidoping efforts).}

\footnote{According to Dr. Neil Robinson, indirect biological-passport evidence helps antidoping authorities to “predict when [certain cyclists are] going to dope, and that allows [them] to provide information to the [UCI] so [it] can better adapt [its] anti-doping tests” to target cyclists with irregularities in their biological-passport profiles. Biological Passport: 10 Years Beyond Other Sports, BIKE RADAR (Mar. 9, 2009, 8:44 PM GMT), http://www.bikeradar.com/}

In other words, the UCI should utilize indirect biological-passport evidence in tandem with proven antidoping controls, such as direct detection of prohibited substances.\footnote{According to Dr. Neil Robinson, indirect biological-passport evidence helps antidoping authorities to “predict when [certain cyclists are] going to dope, and that allows [them] to provide information to the [UCI] so [it] can better adapt [its] anti-doping tests” to target cyclists with irregularities in their biological-passport profiles. Biological Passport: 10 Years Beyond Other Sports, BIKE RADAR (Mar. 9, 2009, 8:44 PM GMT), http://www.bikeradar.com/}
irregularities in an individual cyclist’s biological passport suggest the effects of doping, the UCI should target that cyclist for additional testing. If this targeted testing results in an analytical positive finding, the UCI should then pursue doping sanctions on the basis of the positive doping test.

This approach would offer a number of advantages. First, targeted testing would largely eliminate concerns about the reliability of indirect biological-passport evidence and would provide cyclists with greater safeguards against false positives. Under this approach, doping sanctions would be supported by analytical positive findings in addition to biological-passport data.\(^{248}\) Second, targeted testing would enable the UCI to build a greater body of scientific research linking indirect biological-passport data with analytical positive findings, perhaps laying the foundation for a more robust and scientifically sound biological passport in the future.\(^{249}\) Third, this approach would allow the UCI to avail itself of the strict-liability standard applicable in conventional analytical positive cases. As a result, the UCI might avoid the lengthy and expensive arbitration proceedings that typically result when the UCI pursues controversial nonanalytical positive cases without the benefit of strict liability. Fourth, targeted testing would continue to deter cyclists from doping without subjecting them to potentially unfair sanctions.\(^{250}\)

In fact, targeted testing appears to have been the primary approach envisioned by WADA. In its Athlete Biological Passport Operating Guidelines, WADA describes the biological passport as a

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\(^{248}\) According to Dr. Testa, “[Biological-passport] parameters . . . would make me focus more on the athlete and do more controls on him . . . . [Direct and indirect testing] have to work together.” Ryan, \textit{supra} note 206 (quoting Dr. Testa) (internal quotation marks omitted).

\(^{249}\) Increased data would “improve scientific understanding of the range of [biological-passport] readings that are normal.” Gilbert, \textit{supra} note 80, at 19. According to Dr. Don Catlin, former director of the UCLA Olympic Analytical Laboratory, “To really reduce false negatives, you’ve got to have a lot of data on a lot of people to know where to draw the line . . . . We’re not there yet.” \textit{Id.} (quoting Dr. Catlin) (internal quotation marks omitted).

\(^{250}\) There are, of course, potential disadvantages to targeted testing. For instance, cyclists might be concerned that antidoping authorities would abuse this approach by harassing individual cyclists with excessive testing. Nevertheless, cyclists’ rights are better safeguarded under targeted testing than under a policy of pursuing doping violations based on indirect biological-passport evidence alone. Second, the UCI may be concerned that this approach would make it more difficult to pursue doping violations in the absence of a positive analytical finding, which could result in increased false negatives.
“complementary strategy” to traditional antidoping protocols. WADA states that “[t]he objective of the Athlete Biological Passport is to monitor and identify possible doping in order to intelligently target an Athlete for traditional Doping Controls and where appropriate to establish a doping violation.” This language indicates that indirect biological-passport evidence should be used primarily as a complementary tool, rather than serving as the sole basis for proving doping violations.

Moreover, the UCI has already successfully implemented intelligent, targeted testing based on indirect biological-passport evidence. This approach has proven effective in a number of cases, resulting in analytical positive findings and allowing the UCI to prosecute cyclists for doping based on positive doping tests. Furthermore, in December 2010, the UCI announced plans to increase targeted testing under its biological-passport program.

Nevertheless, the UCI has also continued to pursue controversial nonanalytical positive cases on the basis of indirect biological-passport evidence alone. In fact, in a report following the 2010 Tour de France, WADA drew “stark attention” to the fact that the UCI’s

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251. WORLD ANTI-DOPING AGENCY, supra note 57, at 3. Though these guidelines are not mandatory, they reflect WADA’s position as to the most effective way of administering a biological-passport program. Id. at 4.

252. Id. at 10 (emphasis added) (emphasis omitted).

253. See, e.g., Press Release, Union Cycliste Internationale, Manuel Vazquez Hueso Provisionally Suspended (Apr. 26, 2010), available at http://www.uci.ch/Modules/ENews/ENewsDetails.asp?id=Njg0NQ (“The decision to provisionally suspend this rider was made in response to . . . an Adverse Analytical Finding of EPO in a urine sample . . . . This targeted test was carried out on the basis of information contained in the rider’s biological passport.”); Press Release, Union Cycliste Internationale, Massimo Giunti Provisionally Suspended (Mar. 10, 2010), available at http://www.uci.ch/Modules/ENews/ENewsDetails.asp?id=Njg0Mw (“This adverse finding was a direct result of a targeted urine test conducted because of an unusual blood profile in Mr. Giunti’s biological passport.”); Press Release, Union Cycliste Internationale, Pawel and Kacper Szczepaniak Provisionally Suspended (Mar. 11, 2010), available at http://www.uci.ch/Modules/ENews/ENewsDetails.asp?id=NjE3NA (“These adverse findings were a direct result of a targeted urine test . . . . The blood samples collected before the event . . . had already shown, within the biological passport programme, that the blood profiles of these two riders were suspect.”).

254. Press Release, Union Cycliste Internationale, The UCI Presents the Main Themes of Its Anti-Doping Programme for 2011 (Dec. 3, 2010), available at http://www.uci.ch/Modules/ENews/ENewsDetails.asp?id=NzE1Ng (announcing that the UCI’s 2011 antidoping efforts would “provide[] for a significant increase in the number of controls conducted on riders whose [biological-passport] profiles may indicate illegal behaviour”).

biological passport was “not being backed up with dedicated and targeted anti-doping controls.” Instead, WADA criticized the UCI for continuing to prioritize analysis of indirect biological-passport data “to the detriment of [directly] testing for banned substances.”

In the future, the UCI should consider utilizing the biological passport primarily as a tool for instituting targeted testing, rather than pursuing doping violations on the basis of biological-passport data alone.

B. Imposing a Heightened Standard of Proof in Biological-Passport Cases

Alternatively, if the UCI continues to pursue doping violations based solely on indirect biological-passport evidence, the UCI should be required to prove such violations under a heightened standard of proof. As written, the Code requires antidoping authorities to prove doping violations only to the “comfortable satisfaction” of the hearing panel. This intermediate standard of proof has been criticized in light of the quasi-criminal, penal nature of antidoping cases. The standard of proof applied in analytical positive cases may be less important, as athletes in such cases are held strictly liable for positive doping tests. In nonanalytical positive cases, however, the standard of proof applied can be a determining factor. In light of the continuing uncertainty surrounding biological-passport evidence,

256. Ryan, supra note 206.

257. Barry Ryan, UCI To Study Recommendations of WADA’s Independent Tour de France Report, CYCLING NEWS (Oct. 29, 2010, 4:15 PM), http://www.cyclingnews.com/news/uci-to-study-recommendations-of-wadas-independent-tour-de-france-report. Several cyclists with suspicious biological-passport profiles and impressive Tour performances were not even directly tested. For instance, one cyclist with a “priority index” of ten—meaning that he was considered to be under the highest suspicion of doping—was not required to give any blood or urine samples between April 3, 2010 and the beginning of the Tour, nor was he required to give any blood samples after the Tour had started. Id.

258. WORLD ANTI-DOPING AGENCY, supra note 2, at 26. This standard is “greater than a mere balance of probability but less than proof beyond a reasonable doubt.” Id.

259. See Nafziger, supra note 67, at 54 (“[T]he consequences of a doping infraction are essentially of a penal nature and therefore merit a high standard of proof.”); Straubel, supra note 18, at 1272 (“[T]he burden of proof used in doping cases should be more like that used in criminal cases.”); Weston, supra note 43, at 44 (“The quasi-criminal nature of doping hearings and sanctions warrants a process that comports with the principles underlying Constitutional protections for defendants in criminal cases.”).

260. See Greene, supra note 68, at 157 (discussing the relatively “straightforward evidentiary issues” presented in analytical positive cases under the strict-liability standard).

an intermediate standard of proof provides insufficient safeguards for cyclists accused of doping on the basis of indirect evidence alone.\textsuperscript{262} Instead, WADA and the CAS should consider requiring the UCI to prove doping violations in biological-passport cases beyond a reasonable doubt.\textsuperscript{263} WADA could amend the Code to mandate the beyond-a-reasonable-doubt standard in biological-passport cases, or the CAS could choose to apply this heightened standard in appeals of such cases.\textsuperscript{264} The beyond-a-reasonable-doubt standard would provide more robust protections for cyclists accused of doping on the basis of fluctuations in their biological passports and would better guarantee that innocent cyclists are not wrongly found guilty of doping.\textsuperscript{265} Though a heightened standard would make biological-passport cases more difficult to prove, such a standard would also serve antidoping authorities’ interests by conferring greater legitimacy on those decisions that do find cyclists guilty of doping.\textsuperscript{266} Adopting the beyond-a-reasonable-doubt standard in these cases would largely eliminate the various concerns with the existing approach while allowing the UCI to continue to pursue doping violations on the basis of indirect biological-passport evidence.

\section*{Conclusion}

The biological passport has the potential to be a valuable weapon in the fight against doping in sport. Buoyed by its initial biological-passport successes before the CAS, the UCI will no doubt continue to aggressively pursue doping sanctions against cyclists

\begin{footnotesize}
\textsuperscript{262} See Myler, \textit{supra} note 86, at 750 (describing the comfortable-satisfaction standard as “ambiguous”); Nafziger, \textit{supra} note 67, at 54 (describing critiques that the standard is “too relaxed to protect athletes’ rights of due process”).

\textsuperscript{263} See Greene, \textit{supra} note 68, at 166 (“CAS Tribunals should consider adopting a criminal burden of proof in non-analytical positive cases because evidence of an athlete’s guilt in these matters is not [as] straightforward as it is in doping cases that involve an analytical positive.”); McLaren, \textit{supra} note 84, at 211 (observing that the comfortable-satisfaction standard in nonanalytical positive cases “continues to depend on the gravity of the case and that comfortable satisfaction moves to a very high standard that can become indistinguishable from beyond a reasonable doubt”).

\textsuperscript{264} See Straubel, \textit{supra} note 18, at 1266 (“While the [comfortable-satisfaction] standard has been codified in the World Anti-Doping Code, it was CAS that developed the standard and it will be CAS that will refine the standard.”).


\textsuperscript{266} \textit{Id.}
\end{footnotesize}
solely on the basis of indirect biological-passport evidence. Meanwhile, WADA has adopted uniform biological-passport guidelines, and antidoping bodies in other sports have begun to implement biological passports of their own.\textsuperscript{267}

Nevertheless, antidoping authorities must proceed carefully. The biological passport represents a paradigm shift in antidoping efforts, and it is still being refined. The initial cases pursued through cycling’s biological passport have raised serious concerns about the reliability of inferences drawn from biological-passport data and the fairness of finding an athlete guilty of doping on the basis of indirect evidence alone. These concerns should give future CAS panels pause before they continue to uphold doping sanctions based solely on indirect biological-passport evidence. The biological passport promises a valuable approach to antidoping efforts, but “maybe it’s been put on the road too soon to act as an anti-doping control.”\textsuperscript{268}


\textsuperscript{268} Ryan, supra note 1 (quoting Dr. Corsetti) (internal quotation mark omitted).